Abdullah Sani bin Hashim v Sharma Kumari a/p Oam Parkash & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S5)-23-08 OF 1998
KAMALANATHAN RATNAM J
20 FEBRUARY 2000

Civil Procedure *— Judge — Application to discharge — Judge heard and made findings concerning defendant in separate case — Whether application was bona fide — Whether likelihood of bias against defendant*

The plaintiff sued the defendants for defamation because the defendants alleged that the plaintiff attempted to kidnap the first defendant's son. The defendants filed an application for the judge to disqualify himself from hearing the case because the judge had heard the case of *Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla* [1999] 6 MLJ 589 and had made findings concerning the first defendant and there was a likelihood of bias against the defendants. The defendants also argued that in the present suit the plaintiff had pleaded certain issues, which was pleaded in the other suit that the judge had heard, that concerned the relationship between Dato' Abdullah Hishan and the first defendant.

Held, dismissing the application with costs:

(1) The earlier action by Dato' Abdullah Hishan was only against the first defendant for the repayment of a loan advanced to the first defendant whereas the present action was based on slander and was filed by the elder brother of Dato' Abdullah Hishan. The findings made in the earlier suit were based solely on the evidence of the plaintiff and the defendant's husband who was the second defendant in the present suit as the first defendant did not testify (see pp 602I–603B).

(2) The fact that the defendants did not apply to strike out the pleadings of the plaintiff regarding the relationship between Dato' Abdullah Hishan and the first defendant clearly showed the total lack of bona fides on the part of the defendants' counsel in making the application to disqualify the judge (see p 603D–E).

(3) The fact that the first defendant did not testify in the earlier suit was not an issue in considering whether the judge should disqualify himself as the judge was not the arbiter of the first defendant's truthfulness in relation to the same material in the earlier suit (see pp 603F, 604A); *PP v Metassan* [1993] 1 MLJ 382 distinguished.

[Bahasa Malaysia summary

Plaintif telah menyaman defendan-defendan kerana memfitnah di mana defendan-defendan telah mendakwa plaintif cuba menculik anak defendan pertama. Defendan-defendan telah memfailkan satu

permohonan agar hakim menghilangkan kelayakan diri beliau (disqualify himself) daripada mendengar kes tersebut kerana hakim tersebut telah mendengar kes *Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla* [1999] 6 MLJ 589 dan telah membuat penemuan berhubung dengan defendan pertama dan besar kemungkinan terdapat sikap berat sebelah terhadap defendan-defendan. Defendan-defendan juga menghujahkan bahawa di dalam guaman sekarang ini, plaintif telah memohon beberapa isu tertentu, yang melibatkan hubungan antara Dato' Abdullah Hishan dan defendan pertama.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Tindakan terdahulu oleh Dato' Abdullah Hishan hanya terhadap defendan pertama untuk pembayaran semula satu pinjaman yang diberikan kepada defendan pertama sementara tindakan sekarang ini berdasarkan fitnah dan telah difailkan oleh abang Dato' Abdullah Hishan. Penemuan yang dibuat di dalam guaman terdahulu adalah berdasarkan keterangan plaintif semata-mata dan suami defendan yang merupakan defendan kedua di dalam guaman sekarang ini kerana defendan pertama tidak memberikan keterangan (lihat ms 602I–603B).

(2) Hakikat bahawa defendan-defendan tidak memohon untuk membatalkan pliding-pliding plaintif berhubung dengan hubungan antara Dato' Abdullah Hishan dan defendan pertama jelas menunjukkan bona fide yang benar-benar kurang di pihak peguam defendan di dalam membuat permohonan untuk menghilangkan kelayakan hakim tersebut (lihat ms 603D–E).

(3) Hakikat bahawa defendan pertama tidak memberikan keterangan di dalam guaman terdahulu bukanlah isu di dalam mempertimbangkan sama ada hakim tersebut sepatutnya menghilangkan kelayakan diri beliau kerana hakim tersebut bukanlah pemutus terhadap kebenaran defendan pertama berhubung dengan material yang sama di dalam guaman terdahulu (lihat ms 603F, 604A); *PP v Metassan* [1993] 1 MLJ 382 dibeza.]

Notes

For a case on the disqualification of a judge, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2476.

Cases referred to

Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla [1999] 6 MLJ 589 (refd)

Insas Bhd & Anor v Raphael Pura [1999] 4 MLJ 650 (refd)

PP v Metassan [1993] 1 MLJ 382 (distd)

Legislation referred to

Public Order Act (Cap 148) s 28

M Manoharan (*Karpal Singh & Co*) for the plaintiff. A

Lambert Rasa-Ratnam (*Sean HM Yeow* with him) (*Lee Hishammuddin*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J: The plaintiff sued the defendants for B defamation. It was the case of the plaintiff that on 5 January 1998 at about 8am he was at the premises of Sekolah Rendah Bukit Bandaraya, Jalan Bangkung, Bangsar, waiting to see the headmaster in respect of his daughter who was a student of that school, when he was slandered by the defendants. The plaintiffs brother, one Dato' Abdullah Hishan bin Hj Mohd Hashim, had issued out two writs against the first defendant in respect of two C different matters. He had attempted to serve the said two writs upon the first defendant at the said school in the early morning. The first defendant had refused to accept the writs and instead had telephoned the police for assistance. A police patrol car then arrived at the school premises and two policemen alighted and approached the two defendants. One of the D policemen then walked up to the plaintiff and asked for his identity card. The plaintiff was reluctant to hand over his identity card as he was embarrassed and asked the policeman for the reason he wanted to inspect the plaintiff's identity card. The policeman then told him words to the effect that the first defendant said that the plaintiff and his brother (Dato' Abdullah Hishan) had attempted to kidnap her son. The policeman also E informed the plaintiff that a report to this effect was also made by the first defendant. There was also a case pleaded against the second defendant.

The application to disqualify the judge

For the purposes of this application there is no need for me to narrate the F facts in respect of the second defendant. The defendants filed an application on 20 January 2000 for an order that I recuse myself from hearing this case. The reason given was that I had heard in full one of the two cases filed by Dato' Abdullah Hishan, namely, Kuala Lumpur High Court Civil Suit No S2–22–594–1997 (see *Dato' Abdullah Hishan bin Hj Mohd Hashim v Sharma Kumari Shukla* [1999] 6 MLJ 589). It was contended by the G defendants that I had made findings in the said earlier suit on matters which have also been raised in this action. There were also allegations that I had made findings that the first defendant had: (1) sullied herself by her dismal failure to stand the test of cross-examination; (2) that the defendants had conspired between themselves to allow the first defendant to be used by Dato' Abdullah Hishan for the defendants' mutual benefit; (3) that there H was deceit on the whole conduct of the first defendant and that her intention was to obtain as much benefit as possible from Dato' Abdullah Hishan.

Findings of the court I

As admitted by the defendants in their affidavit in support of the application to disqualify me, the earlier action by Dato' Abdullah Hishan against only the first defendant was inter alia for the repayment of a loan which he had

advanced to the first defendant to enable her to purchase her allotment of shares in Insas Bhd where she was once employed.

The present action is based on slander and is filed by the elder brother. The findings which I made in the earlier suit were based solely on the evidence of the plaintiff and the defendant's husband (the second defendant herein). In fact my judgment states clearly that the husband's evidence was of no help to the first defendant because his evidence was caught by the hearsay rule since whatever he had to tell the court was what was told to him by his wife, the first defendant, who for reasons best known to her, refused to testify. Therefore, all that the court was left with was the evidence of the plaintiff, whose testimony the court accepted, since the plaintiff had stood the acid test of cross-examination.

In the course of his submission, Mr Lambert Rasa-Ratnam for the defendants, argued that the plaintiff in the present suit had brought into the pleadings certain issues leading to the relationship between Dato' Abdullah Hishan and the first defendant as pleaded in the earlier suit which I had heard. To my mind, such pleadings of the plaintiff were dearly irrelevant to the present case before me. In fact I did, as my recorded notes show, ask counsel for the defendants why he did not apply to strike out those irrelevant pleadings, instead of asking the judge to strike himself out. Counsel's answer was as unsatisfactory as this application is. He said, and I quote from my notes, 'I am in no position to explain as we took over conduct on 13 January 2000'. To this I retorted, 'You had the time to put in an application to ask the judge to recuse himself, yet you say you didn't have the time to put in that application'.

This clearly shows to my mind the total lack of bona fides on the part of counsel in making this application to disqualify the judge. Whilst he had the clear option of applying to strike out irrelevant matters, to which application this court would no doubt have been most sympathetic, he chose, for reason only he and his clients will know, to apply to disqualify me.

Mr Rasa-Ratnam also argued that the fact that the first defendant did not testify at the earlier trial should not be a factor for this court to consider in arriving at a decision whether I should disqualify myself or not. He relied on the case of *PP v Metassan* [1993] 1 MLJ 382. I have read this case. It has absolutely no bearing to the issue before me. In fact the issue, for which this case was sought in support, namely, that the fact the first defendant did not testify in the earlier suit should have no bearing in respect of my consideration to recuse myself, did not arise at all in *Metassan*. In *Metassan* the appellant was charged for an offence under s 28 of the Public Order Act (Cap 148) for carrying a firearm without lawful authority. The prosecution relied on an admission made by the appellant which admission, namely, the statements made by the defendant, were hotly challenged on the basis that they were obtained by means of oppressive conduct on the part of the police officer. Counsel for the appellant had also objected to the composition of the court arguing that it would be difficult for the presiding judge to maintain an open mind, since he had already ruled, in another trial, that the statements given by the appellant were voluntary and that there was no oppression. The learned judge refused to disqualify himself in *Metassan* and the trial proceeded. The appellant was found guilty. The Court of Appeal

held that since the presiding judge who had delivered the rulings and the judgment in the previous case was once again to be the arbiter of the appellant's truthfulness *in relation to the self same material* (emphasis provided) the appeal ought to be allowed.

With respect to Mr Rasa-Ratnam, on his own admission irrelevant matters as pleaded in this suit, which formed the basis for this application, could have been struck out. The plaintiffs case is in defamation in respect of words spoken on 5 January 1998. Any other issue relating to the plaintiff's brother's case is irrelevant.

In *Insas Bhd & Anor v Raphael Pura* [1999] 4 MLJ 650 at 661H–662C I said as follows with regard to also an application to disqualify a judge. I said:

> It seems that there is now developing a very unhealthy trend to seek to disqualify a judge at the slightest pretext. Often it seems, when a party has fired all its powder and shot which a perceiving judge finds as nothing more than slings and arrows, the next line of attack seems to be an attempt to allege bias or a real suspicion of bias or a real likelihood of bias, against the judge.
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> It is meet and proper that I cite a passage from the decision of Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin* [1995] 2 MLJ 213 on this question of attempting to harp upon a comment made by a judge and then to try to disqualify him. This is what his Lordship said at p 220F–G:
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> > '... In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.'

I had also in that case exhaustively explained when the rule of bias applies. I adopt the same reasoning to this case in that, 'I would take the requirement to prove a real likelihood of bias as a step even stronger than the existence of real danger' (see p 663F of the said judgment). Where is the bias in this case? It is only in the mind of the defendants and their counsel who very ingeniously side stepped the avenue open to them to strike out unwarranted pleadings and yet had the time to apply to recuse the judge. This application is clearly unacceptable. It has no merits and is repulsive. I therefore dismissed the said application on the very day I heard it with costs and refused a stay pending appeal. As I write this judgment since an appeal has been filed against my decision, I have already concluded this case and would be hearing submissions today.

Application dismissed with costs.

Reported by Chin En Tek